SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 96

JERSEY STATE BANK, *Petitioner*

v.

ROYAL INDEMNITY COMPANY and
THE UNITED STATES, *Respondents*

## Brief of Respondent Royal Indemnity Company in Opposition to Petition for A Writ of Certiorari to the United States Court of Claims

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## INDEX


| | Page |
|---|---|
| Statement of Argument | 1 |
| Argument | 2 |
| Conclusion | 6 |


## CITATIONS

CASES:


*American Surety Company* v. *Sampsell*, 327 U.S. 269 (1946) ..... 2

*Henningsen* v. *United States Fidelity and Guaranty Co.*, 208 U.S. 404 (1908) ..... 3, 4

*National Surety Corp.* v. *United States*, 132 C. Cl. 724, 133 F. Supp. 381 (1955) *cert. denied sub nom. First National Bank* v. *United States*, 350 U.S. 902 ...3, 4, 5

*National Union Fire Ins. Co. of Pittsburgh* v. *United States*, 157 Ct. Cl. 696, 304 F. 2d 465 (1962) ..... 3

*Newark Ins. Co.* v. *United States*, 149 Ct. Cl. 170, 181 F. Supp. 246 (1960) ..... 3

*Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132 (1962) ..3, 4, 5

*Prairie State National Bank* v. *United States*, 164 U.S. 227 (1896) .....2, 3, 4, 5

*Royal Indemnity Co.* v. *United States*, 117 Ct. Cl. 736, 93 F. Supp. 891 (1950) ..... 4, 5

*United Pacific Insur. Co.* v. *United States*, 176 Ct. Cl. —, 362 F. 2d 805 (1966) ..... 3

*United States* v. *Munsey Trust Company of Washington, D. C.*, 332 U.S. 234 (1947) ..... 2


STATUTES AND RULES:


Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203 ..... 3, 4

Rules of The Supreme Court of the United States, Rule 19 ..... 2

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JERSEY STATE BANK, *Petitioner*

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THE UNITED STATES, *Respondents*

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**Brief of Respondent Royal Indemnity Company in Opposition to Petition for A Writ of Certiorari to the United States Court of Claims**

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent Royal Indemnity Company respectfully submits that there are two reasons why the petition for a writ of certiorari herein should be denied:

1. None of the usual reasons for granting the writ are here presented, nor is any new issue of great public importance raised.

2. The question presented has previously been correctly decided.

## ARGUMENT

The writ of certiorari should not be granted for the following reasons:

1. None of the usual reasons for granting review on writ of certiorari as enumerated in Rule 19, Rules of the Supreme Court, are present here. In addition, Respondent, Royal Indemnity Company, respectfully submits that this case does not present new issues or controversy of great public importance, however important it may be to the parties involved. The questions present limited issues which have already been correctly decided in other cases as well as in the case below.

2. The answer to petitioner's question 1 (Pt. br. 2) has already been answered in the negative by a long line of decisions, including decisions of this Court. Beginning with *Prairie State National Bank* v. *United States,* 164 U.S. 227 (1896) the rights of the surety to contract balances under a Government contract have been upheld against the claims of an assignee bank which advanced loans to the contractor. This right of subrogation does not depend on contract rights, but is an equitable lien which this Court has clearly recognized. In *United States* v. *Munsey Trust Company of Washington, D. C.,* 332 U.S. 234 (1947) it was said:

> "From *Prairie State National Bank* v. *United States,* 164 U.S. 227, 17 S.Ct. 142, 41 L. Ed. 412, to *American Surety Company* v. *Sampsell,* 327 U.S. 269, 66 S.Ct. 571, 90 L. Ed. 663, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available monies

ahead of others whose claims come from the advance of money."

And the fact that payment was made by the surety under a payment bond rather than a performance bond does not affect this equitable claim. See *Henningsen* v. *United States Fidelity and Guaranty Co.*, 208 U.S. 404 (1908). In the opinion below (Pt. br. 3a) Chief Judge Cowen stated:

> "The law has long been settled that the rights of a surety in contract retainages are superior to those of the Contractor's assignee: 'The equity of the surety company is superior to the rights of the bank acquired under an assignment, whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond.' *National Surety Corp.* v. *United States*, 132 Ct. Cl. 724, 727, 133 F. Supp. 381, 383 (1955), *cert. denied sub nom. First Nat'l Bank* v. *United States*, 350 U.S. 902; accord, *Henningsen* v. *U.S. Fid. & Guar. Co.*, 208 U.S. 404 (1908); *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896); *Nat'l Union Fire Ins. Co. of Pittsburgh* v. *United States*, 157 Ct. Cl. 696, 304 F. 2d 465 (1962); see *Pearlman* v. *Reliance Ins. Co., supra* at 136; *United Pac. Ins. Co.* v. *United States*, 176 Ct. Cl. , 362 F. 2d 805, 808 (1966).
>
> "Bank contends, however, that a proper reading of the Assignment of Claims Act leads to the conclusion that an assignee has rights in the retainages superior to those of the surety. That contention has been considered by this Court and rejected. See *Nat'l Sur. Corp.* v. *United States, supra; Newark Ins. Co.* v. *United States*, 149 Ct. Cl. 170, 181 F. Supp. 246 (1960); *Nat'l Union Fire Ins. Co. of Pittsburgh* v. *United States, supra.*

We find no reason to depart from our prior decisions on this question."

In *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, (1962) this Court specifically reaffirmed *Prairie State Bank* v. *United States, supra,* and *Henningsen* v. *United States Fid. & Guar. Co., supra.*

The fact that the Assignment of Claims Act of 1940 states that an assignment is a valid assignment "for all purposes" (Pt. br. 7) does not affect the priority of the surety's claim.

> "The long-established principal that an assignee with notice of a prior equity takes only the interest of the assignor was not legislated away by the 1940 Act. The purpose and effect of the 1940 Act was to make a contract claim against the United States assignable before maturity to some single financial institution for the purpose of securing credit; nothing more. No other view would seem compatible with the wording and history of the Act and with expressions of Members of Congress who enacted in into law.
>
> "The intervening bank, which took the legal assignment with knowledge of the surety's prior equity and lent money on the faith thereof stands now in the exact position that would have been occupied by the contractor had there been no assignment and were the contractor himself now before this Court." *Royal Indemnity Co.* v. *United States,* 93 F. Supp. 891, 895 (1950).

Again in *National Surety Corp.* v. *United States, supra,* at p. 384, the Court of Claims stated:

> "There would seem to be no doubt of the right of the United States to use the Contractor's money in its hands to discharge the contractor's obligation to labor and materialmen. One of the

> obligations assumed by the contractor under his contract with the United States was to pay laborers and materialmen."

Not only were the facts and the contentions of the assignee bank in *National Surety* very similar to the facts in this case, but the bank there involved filed a petition for a writ of certiorari which was denied by this Court. Then in *Pearlman* v. *Reliance Ins. Co., supra,* at p. 141, this Court by footnote cited *National Surety Corp.* v. *United States* and *Royal Indemnity Co.* v. *United States* with approval when it stated:

> "We therefore hold in accord with the established legal principles stated above that Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, *would have become entitled to the fund;* and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it." (Emphasis added)

It is elementary that the assignee (The Bank) in this case must stand in the shoes of the assignor (The Contractor) and can have no greater rights than the assignor. And until the assignor discharged his obligation to laborers and materialmen under the contract with the United States, he was not entitled to the fund held by the Government. In short, there was no fund to which the legal assignment could attach. To the extent that the surety under compulsion of its payment bond has paid the obligations of the assignor, its equitable claim to the contract proceeds is superior to that of the assignor and hence the assignee.

## CONCLUSION

For the reasons set forth above the Petition for a Writ of Certiorari to the United States Court of Claims should be denied.

Respectfully submitted,

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